

**Fair Political Practices Commission**  
**MEMORANDUM**

**To:** Chairman Randolph, Commissioners Blair, Downey, Huguenin and Remy

**From:** Brian Lau, Commission Counsel, Legal Division  
John Wallace, Assistant General Counsel  
Luisa Menchaca, General Counsel

**Subject:** Prenotice Discussion of Proposed Revolving Door Regulation 18746.3  
(Section 87406.3)

**Date:** October 6, 2006

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**I. EXECUTIVE SUMMARY**

Under the Political Reform Act (“Act”), there are several categories of post-employment laws, commonly known as the “revolving door restrictions.” (Sections 87400-87407.)<sup>1</sup> Section 87406.3 was added to the Act in 2005 (Stats. 2005, ch. 680) and prohibits specified local governmental agency officials from appearing before or communicating with their former local governmental agency employer for a one-year period. This section took effect July 1, 2006.

Proposed regulation 18746.3 is presented to the Commission for prenotice discussion. This regulation interprets key provisions of section 87406.3, sets out the required elements of the one-year ban as applied specifically to local officials, and defines certain terms that will assist local officials in determining their obligations. Staff believes that section 87406.3 creates significant questions of interpretation due to the section’s subtle differences with section 87406, which imposes a similar one-year ban on former state officials and employees.

**II. BACKGROUND**

Due to the similarities of section 87406.3 to the current revolving door restrictions imposed on state officials and employees, a brief look at the current restrictions is warranted for comparison purposes, specifically the permanent ban of sections 87401 and 87402 and the one-year ban of section 87406.

The first restriction imposed on state officials and employees is the “permanent ban.” The permanent ban prohibits a former state official or employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the

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<sup>1</sup> All references to sections herein are to the Government Code unless otherwise indicated.

former state official or employee participated while serving the state. (Sections 87401-87402; regulation 18741.1.)

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial, or other proceeding in which an official participated. “‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency ....” (Section 87400(c).) Additionally, an official is considered to have “participated” in a proceeding if he or she took part in the proceeding “personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information....” (Section 87400(d).)

The second restriction imposed on state officials and employees is the “one-year ban.” The one-year ban prohibits state officials and employees from communicating, for compensation on behalf of any other person, with their former agency for the purpose of influencing certain administrative or legislative action “or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (Section 87406; regulation 18746.1.)

The one-year ban applies for 12 months from the date the state employee separates from employment. While in effect, the one-year ban prohibits any formal or informal appearance or oral or written communication with the official’s or employee’s former agency “for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding. An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication.” (Regulation 18746.2.)

For purposes of section 87406, “administrative action” and “legislative action” have been specifically defined by the Act, which provides:

“‘Administrative action’ means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding ....” (Section 82002(a).)

“‘Legislative action’ means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. ‘Legislative action’ also means the action of the Governor in approving or vetoing any bill.” (Section 82037.)

Contrasting the permanent ban on state officials and the one-year ban on state officials, the permanent ban applies to “judicial or quasi-judicial” proceedings while the one-year ban applies to any “appearance or communication [which] is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (Section 87406.)

### III. ISSUES

Like the one-year ban of section 87406, subdivision (a) of section 87406.3, the one-year ban on local officials, provides that an official:

“[S]hall not, for a period of one year after leaving that office or employment, act as agent or attorney for, or otherwise represent, for compensation, any other person, by making any formal or informal appearance before, or by making any oral or written communication to, that local government agency, or any committee, subcommittee, or present member of that local government agency, or any officer or employee of the local government agency, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.”

While the language of section 87406.3(a) closely mirrors the language of section 87406, there is a key distinction found in section 87406.3(d)(1), which provides:

“‘Administrative action’ means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any local government agency of any matter, including any rule, regulation, or other action in any regulatory proceeding, whether quasi-legislative or *quasi-judicial*. Administrative action does not include any action which is solely ministerial.” (Emphasis added.)

### IV. PROPOSED REGULATION

Regulation 18746.1 sets out the required elements of section 87406, the one-year ban imposed on state officials. As proposed, regulation 18746.3 is drafted to closely mirror current regulation 18746.1, and attempts to alter the elements of regulation 18746.1 only to the degree necessary to address the subtle but key distinctions between the one-year ban as applied to state officials and the one-year ban as applied to local officials.

Generally, the one-year ban on local officials, provided by section 87406.3, prohibits specified local officials, for a period of 12 months after leaving office or employment, from making appearances before or communications with any local agency

the official worked for or represented during the 12 months before leaving office or employment, if the former official:

- Was an elected official, chief administrative officer of a county, city manager, or general manager or chief administrator of a special district;
- Performs services for compensation;
- Performs services as an agent, attorney, or representative of any other person; and
- Makes an appearance or communication for the purpose of influencing legislative or administrative action or “any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.”

#### **A. Local Public Officials Subject to the One-Year Ban.**

Subdivision (a) of proposed regulation 18746.3 addresses the first key distinction between section 87406.3 and section 87406, which is that section 87406.3 applies only to certain local officials. Since most former local officials will begin their inquiry regarding the one-year ban by determining whether they held a position subject to the ban, subdivision (a) describes the category of officers and employees subject to the ban. These include any: (1) local elected official, (2) chief administrative officer of a county, (3) city manager, or (4) general manager or chief administrator of a special district who holds a position with a local government agency as defined by section 82041.

The Legislature’s use of the term “city manager” presents an interpretation problem for cities that have not labeled their chief administrative officer as a “city manager.” Adding the phrase “including the chief administrator of a city” to subdivision (a)(3) clarifies that section 87406.3 applies to chief administrative officers of cities regardless of whether a city labels its chief administrative officer as a “city manager.”

Also included in subdivision (a) is a clarification that section 87406.3 only applies to those local officials who held or hold a position on or after July 1, 2006. The question of whether section 87406.3 applies to local officials who left governmental service prior to July 1, 2006, has been addressed in the *Griffith* Advice Letter, No. I-06-040 (copy attached), which concluded that since the local official had left governmental service prior to the “operative date” of section 87406.3, section 87406.3 did not prohibit the local official from making appearances before or communications with employees of his former governmental agency.

#### **B. Six-Step Process.**

Subdivision (b) of proposed regulation 18746.3 provides a six-step process that any individual can follow to determine whether the one-year ban for local officials applies. This six-step process is similar to the six-step process of regulation 18746.1.

**Step 1 – Has the local official left his or her local office or employment?**

The local official would first determine whether he or she has left his or her local office or employment. Subdivision (b)(1) of regulation 18746.3 provides that an official has left his or her office or employment if the official has either permanently left local government service or is on a leave of absence. This step is identical to step 1 of regulation 18746.1.

**Step 2 – Will the appearance or communication be made within 12 months after leaving local office or employment?**

Subdivision (b)(2) of regulation 18746.3 merely provides that the ban is in effect for one year. This step is also identical to step 2 of regulation 18746.1.

**Step 3 – Is the appearance or communication for compensated services?**

An official's activity must be for compensated services to be prohibited. However, subdivision (b)(3) of regulation 18746.3 provides that any payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services are not prohibited or limited. Again as drafted, this step is identical to step 3 of regulation 18746.1.

In accordance with regulation 18746.1, the exception for payments made for necessary travel, meals, and accommodations received directly in connection with voluntary services has been included in proposed regulation 18746.3. This exception was included in regulation 18746.1 at the recommendation of a member of the public. At the time, staff found that the term "compensation" was indeed broad enough to include payments made for necessary travel, meals, and accommodations received directly in connection with voluntary services, but that the term "compensation," as defined for purposes of lobbying, excluded reimbursement for reasonable travel expenses such as transportation, food, and lodging. (Regulation 18239(d)(2).) The Commission elected to exclude any payments for necessary travel, meals, and accommodations received directly in connection with voluntary services from the definition of "compensation" as used in regulation 18746.1.<sup>2</sup> Staff recommends that the same exception for local officials be included in regulation 18746.3.

**Step 4 – Will the appearance or communication be made on behalf of any other person?**

Section 87406.3 prohibits an official from representing "any other person." There is a question as to whether this should be interpreted to prohibit appearances or communications made to represent one's own personal interests as defined by regulation 18702.4(b)(1). For state officials, the Commission permits appearances or

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<sup>2</sup> See *Staff Memorandum to Commission, Adoption of Revolving Door Regulations (Section 87406); Regulation 18746.1 and 18746.2*, dated October 26, 1998.

communications to represent one's own personal interests under the one-year ban. (Regulation 18746.1(b)(4).) However, a similar exception for the permanent ban was not included in the final draft of regulation 18741.1. Accordingly, for state officials the permanent ban does not permit an official to represent his or her personal interest in a quasi-judicial proceeding in which the official previously participated.

Subdivision (b)(4) of regulation 18746.3 creates an exception for appearances or communications to represent one's own personal interest but excludes from the exception, appearances or communications to represent one's own personal interest in quasi-judicial proceedings in which the official previously participated. This approach is consistent with the Commission's previous interpretation of the exception for representing one's own personal interest as applied to the one-year ban and permanent ban for state officials.

**Step 5 – Will the appearance or communication be made for the purpose of influencing legislative or administrative action, or any other action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property?**

Subdivision (b)(5) of regulation 18746.3 addresses the key distinction between the new ban affecting local officials in section 87406.3 and the one-year ban in section 87406. For the purpose of section 87406, "administrative action" has been defined as "the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in *any ratemaking proceeding or any quasi-legislative proceeding ....*" (Section 82002(a), emphasis added.)

However, the local ban in section 87406.3(d)(1) provides a distinct definition of "administrative action." This section provides that "[a]dministrative action" means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any local government agency of any matter, including any rule, regulation, or other action in *any regulatory proceeding, whether quasi-legislative or quasi-judicial.*" (Emphasis added.)

By including quasi-judicial proceedings within the definition of "administrative action," section 87406.3(d)(1) merges the concepts behind both the permanent ban for state officials and the one-year ban for state officials into a single one-year ban for local officials. Unlike state officials, there is no permanent ban for judicial or quasi-judicial proceedings. However, section 87406.3 applies a one-year ban to judicial or quasi-judicial proceedings for local officials.

Subsections (b)(5)(A) and (b)(5)(D) of the draft regulation duplicate the definitions of "administrative action" and "legislative action," as provided by section 87406.3(d), except for one small clarification within the definition of "administrative action." The statutory definitions have been included within the regulation to help clarify that the one-year ban for local officials includes quasi-judicial proceedings. Because the Act and regulations only provide definitions for "quasi-legislative" and "quasi-judicial"

in the context of state proceedings, broad definitions for “quasi-legislative” and “quasi-judicial” have also been included in subsections (b)(5)(B) and (b)(5)(C).

As discussed above, the draft regulation includes one clarification to the definition of “administrative action” regarding ratemaking proceedings. Section 87406 specifically provides that the one-year ban for state officials applies to ratemaking proceedings. However, section 87406.3 does not expressly reference ratemaking proceedings. With no express reference to ratemaking proceedings, there is a question of whether ratemaking proceedings were intentionally omitted from local restrictions or whether ratemaking proceedings are included within the phrase “regulatory proceeding.”

A similar question of interpretation arose after section 87406.1, which created a one-year ban for former employees of air pollution control districts or air quality management districts, was added to the Act. In the *Wood* Advice Letter, No. A-95-167, we concluded that section 87406.1, prohibiting appearances or communications made for the purpose of influencing a “regulatory action,” should be broadly defined to include ratemaking proceedings. Consistent with this past interpretation of “regulatory action,” the draft regulation (at subsection (b)(5)(A)) includes ratemaking proceedings within the phrase “regulatory proceedings.”

#### **Step 6 – Which agencies must an official avoid for one year?**

Subdivision (b)(6) of regulation 18746.3 provides a test for a public official to determine whether he or she is prohibited from appearing before or communicating with any particular agency. Again, this step is similar to step 6 of regulation 18746.1 except for the deletion of subsection (b)(6)(C), which provides a test for designated employees of the Governor’s office that is inapplicable to regulation 18746.3.

Subsection (b)(6)(A) provides that the one-year ban applies to appearances or communications by a local official before or with any local agency the official worked for or represented during the 12 months before leaving local governmental office or employment. (*Perry* Advice Letter, No. A-94-004.) Subsection (b)(6)(B) provides that the one-year ban also applies to appearances or communications by a local official before or with any agency under the direction or control of the official’s former agency. This is known as the “pyramid concept.” (*Monagan* Advice Letter, No. A-93-473.)

#### **C. Representing Another Public Agency**

Last and as provided by section 87406.3(b), subdivision (c) of regulation 18746.3 provides that the one-year ban for local officials does not apply if the official makes an appearance or communication in representation of another public agency.

## **V. STAFF RECOMMENDATION**

Staff proposes noticing proposed regulation 18746.3 for adoption at the December 2006 Commission Meeting.

### **Attachments**

*Griffith* Advice Letter, No. I-06-040  
Proposed regulation 18746.3